RICKY THONG YEW FOOK

v.

OCBC BANK (M) BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-742-2004]
30 JANUARY 2007

CIVIL PROCEDURE: *Res judicata - Issues, similarity of - Present action based on tort of trespass and earlier action based on rights of receivers and managers - Same issues involved in respect to right of receivers and managers to receive and manage company's properties - Res judicata applied in wider sense in Henderson v. Henderson [1843] - Case cannot be re-litigated anew*

COMPANY LAW: *Receivership - Duties of receivers and managers - Duty to enter company's premises to take possession of all assets charged - Right of entry implied if not expressed - No trespass committed by receivers and managers in lawfully entering company's premise*

COMPANY LAW: *Receivership - Winding-up, effect of - Possession and management of company's assets - Even after liquidator is appointed receivers and managers can continue to be in possession and manage company's assets taken as per terms of debenture - Right to possession of company's premises a consequence of right to possession of company's assets*

COMPANY LAW: *Receivership - Winding-up, effect of - Payment of liquidator's expenses - Whether receivers and managers liable to pay for liquidator's expense where liquidator is not employed by them*

COMPANY LAW: *Receivership - Winding-up, effect of - Accounts - Receivers and managers only obliged to lodge detailed accounts to Registrar - Receivers and managers owe no duty to submit any account to liquidator for properties received and managed under debentures*

On 13 June 1998 the receivers and managers (2nd and 3rd defendants) were appointed by the debenture holder (the OCBC Bank - 1st defendant) under the terms of the three debentures issued by Zanshin Plastic Industrial Sdn Bhd to the bank. On 7 July 1998 a resolution for the voluntary winding-up of the company was passed and the plaintiff was appointed as the liquidator of the company. On 13 June 1998 the liquidator and the receivers and managers met at the company premises to take possession of all the charged assets. As all the assets of the company had been debentured to the 1st defendant, the 2nd and 3rd defendants took possession thereof. The liquidator issued a notice dated 24 November 1998 demanding the return of the company's property.

This was a hearing under O. 14A of the Rules of the High Court 1980. The issues for the determination of the court were *inter alia* as follow: (a) whether the plaintiff was estopped from raising by a fresh action relating to the issue as to validity of the sale of the charged assets given that the said sale was sanctioned by the court *vide* Originating Summons No. D5-24-176-2000 ("the Originating Summons") to which the plaintiff was a party; (b) whether the commencement of the liquidation of the company had no effect on the right of the 2nd and 3rd defendants to manage the company's affairs; (c) whether the plaintiff as liquidator of the company had no right to take over assets of the company that have been charged under a debenture; (d) whether the 2nd and 3rd defendants had a right to possession of the company's premises and disposal of the charged assets and management of the affairs of the company under the terms of the debenture; (e) whether the 2nd and 3rd defendants were liable for the liquidator's expenses in carrying out his statutory duties; and (f) whether apart of the receivers & managers' accounts filed pursuant to s. 190 of the Companies Act 1965, the 2nd and 3rd defendants were not obliged to forward any of their accounts to the plaintiff.

Held (dismissing the plaintiff's suit with costs):

(1) The issues raised in this suit involved the same issues raised in the hearing of the Originating Summons with respect to the right of the 2nd and 3rd defendants to receive and manage the company's properties although the present action was based on the tort of trespass and the other on the rights of the receivers and managers. *Res judicata* therefore applied in the wider sense of the principle in *Henderson v. Henderson* [1843] 3 Hare 100. The plaintiff was therefore incompetent to re-litigate his case anew. The associated issues should have been raised during the hearing of the Originating Summons and were therefore *res judicata.* (paras 8 & 9)

(2) Upon being appointed receivers and managers by the 1st defendant, the 2nd and 3rd defendants had to enter the premises of the company to take possession of all the assets charged to the company consistent with the terms of the debentures. The right of entry into the company's premises if not express is to be implied. The question of committing trespass did not arise as it was clear that the 2nd defendant and the 3rd defendant had the right to enter as an agent of the 1st defendant. A person cannot commit trespass if he is lawfully entitled and authorized to enter a premise. (paras 10, 11, 12 & 13)

(3) Whereas the liquidator's function is to liquidate the assets of the company for the purpose of the voluntary winding up, the receivers and managers' function is to receive and manage the assets taken by the 1st defendant under the debenture. The 2nd and 3rd defendants (receivers and managers) should therefore be able to continue to manage the assets of the company even after a liquidator is appointed by the company. (para 14)

(4) The liquidator can only liquidate the assets of the company which are not debentured and has no right to take over the assets of the company which had been charged under the debentures. Therefore, the 2nd and 3rd defendants should be able to be in possession and to continue to manage the assets that they had taken possession of as per the terms of the debentures. The right to possession of the company's premises is a consequence of their right to the possession of the company's asset. (paras 15 & 16)

(5) The liquidator was not employed by the 2nd and 3rd defendants receivers and managers. The receivers and managers were in turn employed by the 1st defendant who was in effect a creditor of the company to receive and manage its interests in the debentures. It follows as a matter of course that they should not be liable to pay for the plaintiff liquidator's expense. (para 17)

(6) The 2nd and 3rd defendants as receivers and managers were only obliged to comply with s. 190 of the Companies Act 1965 to lodge the detailed accounts specified under sub-s. 1(a) (i), (ii) and (iii) to the Registrar. It would be for the liquidator to obtain a copy from the Registrar if required. The receivers and managers owe no duty to submit any account to the liquidator with respect to the properties received and managed under the debentures. (para 18)

Case(s) referred to:
Henderson v. Henderson [1843] 3 Hare 100 ***(foll)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 190
Companies (Winding Up) Rules 1972, r. 66
Rules of the High Court 1980, O. 14A

For the plaintiff - Sanjivpal Singh; M/s Gurdial Bakan Singh
For the 1st defendant - KK Chan; M/s Shook Lin & Bok
For the 2nd & 3rd defendants - Izabella De Silva; M/s Iza Ng Yeoh & Kit

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J:

[1] This is a hearing under O. 14A of the Rules of the High Court 1980.

[2] The suit was case managed by His Lordship the late Abdul Wahab bin Said Ahmad J before whom the parties have agreed to the following issues for the determination of this court:

(1) whether the plaintiff is estoppel from raising by a fresh action relating to the issue as to validity of the sale of the charged assets given that the said sale was sanctioned by court order dated 9 March 2001 in Kuala Lumpur High Court Originating Summons No. D5-24-176-2000 to which the plaintiff was a party;

(2) whether the commencement of the liquidation of the company had no effect on the right of the 2nd and 3rd defendants to manage the company's affairs;

(3) whether the plaintiff as liquidator of the company has no right to take over assets of the company that have been charged under a debenture;

(4) whether the 2nd and 3rd defendants have a right to possession of the company's premises and disposal of the charged assets and management of the affairs of the company under the terms of the debenture;

(5) whether the 2nd and 3rd defendants are liable for the liquidator's expenses in carrying out his statutory duties;

(6) whether apart of the receivers & managers' accounts filed pursuant to s. 190 of the Companies Act 1965, the 2nd and 3rd defendants were not obliged to forward any of their accounts to the plaintiff.

[3] The parties have agreed that the documents in encl. 34 are agreed in full as to contents and authenticity. A statement of agreed facts had also been prepared and agreed to by the parties as follows:

Date	
19.8.1996	A Debenture was created by Zanshin Plastic Industrial Sdn Bhd ("Zanshin") in favour of the 1st Defendant to secure various credit facilities granted to Zanshin by the 1st Defendant.

19.8.1996	The Form 34 (Statement of Particulars To Be Lodged with Charge) in respect of the above Debenture was signed by Zanshin's directors
15.3.1997	The Form 40 (Certificate of Registration of Charge) in respect of the above Debenture was issued by the Registry of Companies.
27.12.1996	A 2nd Debenture was created by Zanshin Plastic Industrial Sdn Bhd ("Zanshin") in favour of the 1st Defendant to secure various credit facilities granted to Zanshin by the 1st Defendant.
27.12.1996	The Form 34 (Statement of Particulars To Be Lodged with Charge) in respect of the 2nd Debenture was signed by Zanshin's directors.
28.1.1997	The Form 40 (Certificate of Registration of Charge) in respect of the 2nd Debenture was issued by the Registry of Companies.
23.6.1997	A 3rd Debenture was created by Zanshin Plastic Industrial Sdn Bhd ("Zanshin") in favour of the 1st Defendant to secure various credit facilities granted to Zanshin by the 1st Defendant.
23.6.1997	The Form 34 (Statement of Particulars To Be Lodged with Charge) in respect of the 3rd Debenture was signed by Zanshin's directors.
5.8.1997	The Form 40 (Certificate of Registration of Charge) in respect of the 3rd Debenture was issued by the Registry of Companies.
30.5.1998	A letter of demand for payment of outstanding debts was issued by the 1st Defendant's previous solicitors, M/s Tan Boon Lin & Co., to Zanshin as Zanshin had defaulted in repayment of the said credit facilities.
10.6.1998	The Form 65A (Statutory Declaration of Inability of Company to Continue Business And That Meetings of the Company and Its Creditors Have Been Summoned) was executed by Zanshin's directors.
10.6.1998	Nomination of Plaintiff as Provisional Liquidator.
10.6.1998	Letter from Plaintiff's office accepting the nomination.
10.6.1998	The Form 61 (Statement of Affairs) was issued.

12.6.1998	A Form 72 (Notice of Appointment and Situation of Office of Liquidator) was executed by the Plaintiff.
13.6.1998	The 1st Defendant's letter appointing the 2nd and 3rd Defendants as Receivers and Managers of Zanshin.
13.6.1998	The Form 59 (Notice of Appointment of Receivers And Managers) was executed and filed by the 2nd and 3rd Defendants with the Registry of Companies and served on the Plaintiff and on the Company Secretary, Yeap Gim Chuan on the same day.
13.6.1998	A Notice of Crystallisation of floating charge was issued by the 1st Defendant to Zanshin.
13.6.1998	The Plaintiff and the Defendants arrive at Zanshin's premises and the 2nd and 3rd Defendants take possession of assets charged by Zanshin to the 1st Defendant: (a) HS (D) 1192/91 PT No 3234; (b) HS (D) 131/94 PT No. 4729; (c) HS (D) 1193 PT No. 3235; (d) HS (D) 1194/91 PT No. 3236; and (e) HS (D) 1217/91 PT No. 3259, all in Mukim Sungei Seluang, Daerah Kulim, Kedah Darul Aman. The Lands described in paragraphs (a) - (d) above were also charged to the 1st Defendant under National Land Code charges as security for various credit facilities granted to Zanshin by the 1st Defendant. The Land described in paragraph (e) above was charged by Zanshin to Multi-Purpose Bank Berhad under a National Land Code charge.
15.6.1998	The Plaintiff's letter to the 2nd and 3rd Defendants demanding the return of possession of property
25.6.1998	The 2nd and 3rd Defendants' reply to the Plaintiff's aforesaid letter dated 15.6.1998.
25.6.1998	The Notice of Meeting of Creditors issued by the Plaintiff.

26.6.1998	The Plaintiff's reply to the 2nd and 3rd Defendants' aforesaid letter dated 25.6.1998.
7.7.1998	The Extraordinary General Meeting of Creditors and Contributories of Zanshin was held.
20.7.1998	The Plaintiff's reply to above letter.
24.7.1998	The 2nd and 3rd Defendants' reply to the Plaintiff's letter.
27.8.1998	An *Ex parte* Order was obtained by the Plaintiff declaring himself as liquidator of Zanshin in Kuala Lumpur High Court Originating Summons No. D2-24-400-1998.
24.9.1998	An *Ex parte* Order was obtained by the Plaintiff requiring all assets to be delivered to the Plaintiff pursuant to Sections 233(1) and 233(2) of the Companies Act, 1965 *vide* Kuala Lumpur High Court Originating Summons No D5-24-443-1998.
24.11.1998	The Plaintiff's notice under Rule 66 of the Companies (Winding Up) Rules 1972 demanded surrender of assets and property.
27.11.1998	The 2nd and 3rd Defendants' solicitors' reply to the Plaintiff's above notice.
7.3.2000	The 2nd and 3rd Defendants' advertisement of the Sale of Assets placed in The Star and Sin Chew Jit Poh newpapers on 7.3.2000 and 8.3.2000.
31.3.2000	An Order was obtained by the 1st Defendant setting aside *Ex parte* Order dated 24.9.1998.
27.3.2000	The 2nd and 3rd Defendants received a revised offer from Multi Purpose Refinery Trading for all plant and machinery and other movable assets.
24.4.2000	The 2nd and 3rd Defendants' advertisement of the Sale of Assets placed in The Star and Sin Chew Jit Poh newpapers.
4.8.2000	The 2nd and 3rd Defendants filed at the Kuala Lumpur High Court their Originating Summons No. D5-24-176-2000 seeking for, *inter alia*, a declaration and validation of the sale of plant machinery and other movable assets by them.

9.3.2001	An Order in terms of the aforesaid Originating Summons was obtained by the 2nd and 3rd Defendants after full *inter partes* hearing No appeal was filed by the Plaintiff and Zanshin against the said Order.
9.10.2001	An Order for sale of lands charged by Zanshin to the 1st Defendant was obtained by the 1st Defendant after full *inter partes* hearing.
31 10.2001	The 2nd and 3rd Defendants' letter to the Plaintiff.
24.1.2002	The 2nd and 3rd Defendants' letter to the Plaintiff handing over the keys to Zanshin's premises.
1.2.2002	The Form 60 filed by the 2nd and 3rd Defendants giving notice of the Receivers and Managers ceasing to act.

[4] The arguments of the 2nd and 3rd defendants are as follows:

1. The plaintiff is the liquidator of the Zanshin Plastic Industrial Sdn Bhd (In Liquidation) pursuant to a resolution of members of the company and the lodgment of Form 65A to the ROC on 11 June 1998 and the plaintiff was appointed as a provisional liquidator.

2. The 1st defendant appointed 2nd and 3rd defendants as receivers and managers on 13 June 1998.

3. On 7 July 1998 a resolution for the voluntary winding-up of the company was passed and the plaintiff was appointed as the liquidator of the company whose appointment was later confirmed by the court on 7 July 1998.

4. On 13 June 1998 the receivers and managers (2nd and 3rd defendants) were appointed by the debenture holder (the OCBC Bank – 1st defendant) under the terms of the three debentures issued by the company to the bank.

5. On 13 June 1998 the liquidator and the receivers and managers met at the company premises to take possession of all the charged assets. As all the assets of the company had been debentured to the 1st defendant, the 2nd and 3rd defendants took possession thereof.

6. The liquidator issued a notice dated 24 November 1998 demanding the return of the company's property. The notice was issued under r. 66 of the Companies (Winding Up) Rules 1972.

Submits: The 2nd and 3rd defendants being the receivers and managers under the terms of the debentures stepped into the shoes of the company to claim all the charged assets both immovable and movable assets comprising of fixed and floating charges including choses in action, undertaking and stock and trade and all receivables. This right is to be found in all the three debentures (all para materia) in art. 6 p. 16.

Hence this application (encl. 14).

7. In the Originating Summons No. D5-24-176-2000 to which the plaintiff was a party, the plaintiff raised the issue of illegal trespass in entering the company premises to take possession of the movable assets that the 2nd and 3rd defendants sold subsequently after obtaining a validation order on 9 March 2001. Because this issue was raised in that proceeding, the plaintiff is estoppel from raising the same issue in this action.

8. The commencement of liquidation of the company has no effect on the right of the 2nd and 3rd defendants to manage the company's affairs.

9. The plaintiff as liquidator of the company has no right to take over the assets of the company that had been charged under the debenture.

10. The 2nd and 3rd defendants had the right to possession of company premises and disposal of the charged assets including the management of the company.

11. The 2nd and 3rd defendants are not liable for the liquidator's expenses for carrying out his duties. The reason was that the receivers and managers can only disburse funds authorised by the debentures and statutory provisions of the laws.

12. The receivers and managers had submitted all such accounts of the company which were required to be forwarded.

[5] The argument of the plaintiff is as follows:

1. On *res judicata* - the issue must not be raised but must also be subjected to adjudication and the issue of trespass was never argued or adjudicated upon and decided in the Originating Summons of D5-24-176-2000.

2. On the question of trespass, we rely on *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274 SC. Receivers are bound to give notice to liquidator before entering the company premises and taking possession of the immovable properties and other assets. The defendant bank has not filed the Form 16K which is the requirement under the National Land Code to take over the properties.

3. In respect of the properties charged to the one property charged to Multi-Purpose, the 2nd and 3rd defendants have no right to possession. They took possession of this particular property. They have failed to give notice.

[6] Reply by counsel for the 2nd and 3rd defendants:

1. *Kimlin* does not apply because the 2nd and 3rd defendants did not say any land charged under the National Land Code.

2. With respect to the property charged to Multi-Purpose, possession was taken by the 2nd and 3rd defendants acting under the terms of debentures because the entire undertaking of the company (every single thing that the company owned is charged under the debenture to the 1st defendant under which the 2nd and 3rd defendants were appointed. In respect of the charge to Multi-Purpose Holdings, the properties still belong to the company. As registered owner it has certain right over the property for instant to rent it out to somebody else as a tenant and the rent would constitute an asset under the debenture.

[7] At this proceeding the parties have further agreed to distill the issues down to two as follows:

1. whether estoppel applies to prevent the plaintiff from instituting this action in trespass when the right of the 2nd and 3rd defendants receivers and managers had been determined in the previous Originating Summons;

2. if the plaintiff is not estoppel, whether the 2nd and 3rd defendants were committing trespass when they entered the properties of the company.

Findings And Decision

Whether Estoppel Applies

[8] I accept the submission of counsel for 2nd and 3rd defendants that the present issues raised in this suit involves the same issues raised in the hearing of the Originating Summons with respect to the right of the 2nd and 3rd defendants to receive and manage the company's properties although the present action is based on the tort of trespass and the other on the rights of the receivers and managers. *Res judicata* therefore applies in the wider sense of the principle in *Henderson v. Henderson* [1843] 3 Hare 100 per Wigram VC at 115:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.

[9] I would therefore have to find the plaintiff incompetent to re-litigate his case anew as he is so to speak, merely filling old wine in a new bottle. The matters raised for the determination of the court as originally set out in the issues two to six were associated issues which should have been raised at the Originating Summons D5-22-176-2000 and were therefore *res judicata*.

Whether Trespass Was Committed By The 2nd And 3rd Defendants

[10] Upon being appointed receivers and managers by the 1st defendant, they (the 2nd and 3rd defendants) had to enter the premises of the company to take possession of all the assets charged to the company consistent with the terms of the debentures authorizing the 1st defendant to exercise its right under the debenture.

[11] The right of entry into the company's premises if not express is to be implied. In addition, the 1st and 2nd defendants in this case would be obliged to perform the managerial and executive duties of the company given that virtually all the assets both moveable and immovable had been debentured to the 1st defendant.

[12] The question of committing trespass does not arise as it is clear that the 2nd defendant and the 3rd defendant had the right to enter as an agent of the 1st defendant who would be exercising its right under the debentures.

[13] I am unable to agree with the submission that the 2nd and 3rd defendants (receivers and managers) must first give a notice to the liquidator before they enter and assume control of the company and that in failing to do so they had committed trespass. It stands to common sense that a person cannot commit trespass if he is lawfully entitled and authorized to enter a premise. The entry itself served as a notice *albeit* sudden. A notice in advance of entry is purely a matter of courtesy of no legal consequence. Further the actions of the 2nd and 3rd defendants as receivers and managers had been validated by the court *vide* Originating Summons D5-24-176-2000 when the sale of debentured assets of the company was validated.

[14] Issues 2 to 6 would have to be answered as follows:

Issue 2 (the effect of liquidator on the function of the receivers and managers):

Whereas the liquidator's function is to liquidate the assets of the company for the purpose of the voluntary winding up, the receivers and managers' function is to receive and manage the assets taken by the 1st defendant under the debenture. The 2nd and 3rd defendants (receivers and managers) should therefore be able to continue to manage the assets of the company even after a liquidator is appointed by the company.

[15] Issue 3 (right of the liquidator):

The liquidator can only liquidate the assets of the company which are not debentured and it follows therefore that he had no right to take over the assets of the company which had been charged under the debentures.

[16] Issue 4 (right to possession of company's possession and management of its assets):

The liquidator cannot lay its hands over the debentured assets. It follows that the 2nd and 3rd defendants (receivers and managers) should be able to be in possession and to continue to manage the assets that they had taken possession of as per the terms of the debentures. The right to possession of the company's premises is a consequence of their right to the possession of the company's asset.

[17] Issue 5 (liability of the 2nd and 3rd defendants for the liquidator's expense in carrying out his statutory duties):

The liquidators were not employed by the 2nd and 3rd defendants receivers and managers. The receivers and managers were in turn employed by the 1st defendant who was in effect a creditor of the company to receive and manage its interests in the debentures. It follows as a matter of course that they should not be liable to pay for the plaintiff liquidator's expense.

[18] Issue 6 (providing accounts to the liquidator.)

The obligation of the 2nd and 3rd defendants as receivers and managers was only obliged to comply with s. 190 of the Companies Act 1965 to lodge the detailed accounts specified under sub-s. 1(a)(i), (ii) and (iii) to the registrar. It would be for the liquidator to obtain a copy from the registrar if required. The receivers and managers owe no duty to submit any account to the liquidator with respect to the properties received and managed under the debentures.

[19] The plaintiff's suit is dismissed with costs